January 27, 1999

MEMORANDUM TO: Chairman Jackson

FROM: William D. Travers
Executive Director for Operations

SUBJECT: YOUR MEMORANDUM OF JANUARY 7, 1999, REGARDING OIG, INQUIRY, CASE NO. 99-01S

This is in response to your January 7, 1999, memorandum regarding the Office of Inspector General Event Inquiry, Case No. 99-01S, NRC's Handling of Harassment and Intimidation (H&I) Complaints at Millstone. You requested a response by January 22, 1999, but at our request extended this due date until January 27, 1999.

The Inspector General (IG) report principally addresses the NRC staff's investigation and subsequent enforcement action stemming from allegations of harassment and intimidation in connection with the January 1996 layoff at the Millstone plants. Although the IG report did not address the enforcement decision itself, it did address a number of concerns about processes that were used in reaching the decision.

We agree that there is need to improve some of the staff's investigation and enforcement processes and as described below, the staff has developed near-term and longer-term actions to address the issues raised in this report. The lack of documentation at various steps in the evaluation process could reasonably lead to questions as to how the enforcement decision was reached on OI Report 1-96-007. It is staff's view, however, that all of the available information was appropriately considered in reaching the enforcement decision.

The staff's lessons learned, corrective actions and clarifying points follow. Specific responses to your questions are in Attachment 1. We have also included additional information which provides background on the processes or circumstances surrounding this case.

Lessons Learned

The staff's review of the IG report has resulted in a number of lessons learned which we have already implemented or are implementing. Moreover, as discussed with you, we are initiating a broader, consultant-assisted, programmatic assessments of the Enforcement and Investigations programs. Specifically, the initial lessons learned can be summarized as follows:

(1) Better documentation is needed to close OI investigations, not documented in the normal manner.

(2) Better documentation is needed to reflect the deliberative enforcement process.

(3) Better communications are needed in closed Commission briefings by OI and OE related to investigative activities and associated enforcement deliberations.

(4) Better communications are needed in letters to allegers closing out multiple allegations of discrimination where only a sample of the alleged acts of discrimination were investigated.

Corrective Actions

Accordingly, the following corrective actions have been or will be taken:

(1) Effective immediately, for cases where the Department of Justice (DOJ) has specifically requested that OI not generate written conclusions prior to their review of a matter, written conclusions will be provided by OI once DOJ returns the case to the NRC.

(2) On January 14, 1999, further guidance addressing documentation of the status of deliberations during the enforcement process was issued by the Director of OE in the enclosed Enforcement Guidance Memorandum (EGM) 99-001. Training was given to OE, Regional, NRR, and NMSS enforcement coordinators on EGM 99-001 during a counterpart meeting held on January 20, 1999.

(3) At least quarterly briefings will be offered to the Commission to discuss sensitive OI investigations and associated enforcement implications and status. The staff will provide written information to facilitate the meeting. The Commission will be informed of substantive changes in status that occur between meetings. The first briefing occurred on January 15, 1999. Appropriate guidance will be prepared by June 1999 to document this practice.

(4) Letters clarifying NRC's actions will be sent to the allegers who received letters stating that their allegations were not substantiated, even though investigations were not conducted into their individual claims. It is expected that such letters will be issued by February 6, 1999.

(5) Current enforcement practices will be reviewed for adherence to the guidance in the Enforcement manual. The guidance in the Enforcement Manual for the enforcement panel process will be reviewed for improvements. These reviews will be completed by June 1999.

(6) Current investigation practices will be reviewed for adherence to the Investigation Procedures Manual. The guidance in the Investigation Procedures manual for handling internal disputes will be reviewed for improvements. These reviews will be completed by June 1999.

As mentioned earlier, we are initiating a broader, consultant-assisted assessments of the Enforcement an Investigation programs. These assessments, similar to the one currently underway in the Office of Nuclear Reactor Regulation (NRR), will address fundamental questions such as what are the desired outcomes for these programs and what are the most effective strategies to accomplish them.

Clarifying Points

In regard to a number of the report conclusions, the following clarifying points are provided.

Conclusion 2. This conclusion states, that as a result of the December 1997 enforcement panel meeting, a decision was made to take enforcement action and the Commission was so informed. Although the Enforcement Strategy Form incorrectly states otherwise, in fact, the position of the Director of the Office of Enforcement (OE), based on the panel discussion, was to proceed with development of the case pending further review of the evidence and receipt of additional information. As recognized in the body of the IG report, the preliminary nature of this decision is reflected in a December 5, 1997, letter from the OI Region I FOD to the Department of Justice (DOJ) (Page 7), and in several closed meetings with the Commission (Page 12).

Conclusion 4. This conclusion implies that the staff may have led the Commission into thinking that the investigative conclusions and agents' analyses would be added to the report before the discussion at the enforcement panel. While there may have been miscommunication, there was no intention to mislead (see Page 5 last paragraph of report).

Conclusion 5. This conclusion states that "...the NRC staff's decision to investigate only the cases which provided the strongest evidence of discrimination was not inappropriate. However, the NRC staff's handling of enforcement action regarding OI Case 1-96-007 runs counter to this stated enforcement philosophy." It is not clear what enforcement philosophy was not met. Since the staff concluded that discrimination was not substantiated for this case enforcement action was not taken.

Attachments:
1. Responses to Questions
2. Enforcement Guidance Memorandum 99-001, Guidance for Preparing and Maintaining EA Requests & Enforcement Strategy Forms, dated January 14, 1999
3. Sample letters to Allegers Subject to the January 1996 Layoffs

cc w/attachments:
Commissioner Dicus
Commissioner Diaz
Commissioner McGaffigan
Commissioner Merrifield
Hubert Bell, IG

OGC
OCA
CFO
CIO

Attachment 1

RESPONSES TO QUESTIONS

A fuller discussion of the lessons learned and other issues associated with the IG report are addressed below in response to the questions raised in your January 7, 1999, memorandum.

1. Should OI analyses and conclusions be added to OI reports following a Department of Justice (DOJ) prosecutorial decision? If not, why not?

   Response: Yes. Effective immediately, where DOJ has specifically requested that OI not prepare written conclusions prior to its review, OI will provide written conclusions and synopses after DOJ returns the case to the NRC. A agent's analysis will also be provided in cases where OI concludes that it has substantiated wrongdoing. OI will amend its Investigations Procedures Manual to reflect these changes.

   Additional Information:

   OI Reports of Investigation (ROI) which are forwarded to DOJ for prosecutive consideration normally include conclusions and agent's analyses. The lack of conclusions and analyses in most of the Millstone reports issued over the past three years was a decision made to honor the request of the U.S. Attorney's Office in Connecticut that the Millstone and Haddam Neck OI cases, which were being reviewed for prosecutive merit, not include this information. However, OI did provide the enforcement staff with its views after the cases were returned to the staff from DOJ, as is the general practice. Accordingly, in processing OI report 1-96-007, the relevant information was available to the enforcement staff and was considered in reaching the enforcement decision.

   Although OI conclusions and analyses are important, it should be noted that OI conclusions do not serve as the basis for staff actions, and, while helpful to the staff, do not have evidentiary value. Rather, it is the evidence gathered by OI which must be evaluated to determine if that evidence is sufficient to support going forward with a case. Thus, the staff "examine[s] the underlying facts and evidence and develop[s] its own conclusions" in accordance with Commission direction in a March 18, 1986, Staff Requirements Memorandum (SRM) (M860312). The SRM further stated that "The staff is not obligated to accept without question the conclusion of the OI report." The overall process will be enhanced by ensuring, in the future, that written conclusions and agent's analyses will be provided as described above.

As to whether the staff led the Commission to believe that the investigative conclusions and agents' analyses would be added to the report before the discussion at the enforcement panel, there may have been miscommunication. However, there was no intention to mislead the Commission (see Page 5 last paragraph of report). The lack of written OI conclusions are not believed to have adversely impacted the subject enforcement deliberations or the enforcement decision since the views of both OI management and the investigator were known for case 1-96-007.

2. If OI analyses and conclusions are not going to be added to OI reports following a prosecutorial decision, but rather articulated orally by OI representatives during enforcement panels and similar meetings with the NRC staff, what steps should be taken to preserve the views of official positions of OI to the extent they provide the bases for NRC enforcement actions? Should the oral views be documented? How should this information be made available to agency officials involved in enforcement action decisions? What special precautions are necessary in handling the information to ensure it is not leaked?

   Response: As noted above, written conclusions and, for substantiated cases, analyses, will be provided by OI following DOJ's review.

3. Are synopses, conclusions, or agent's analyses excluded from all OI reports (cases) that are referred to a U.S. Attorney's office? If so, why? How long has this been a practice?

   Response: No, these elements were excluded only for certain Millstone and Haddam Neck reports issued since November 1996.

   Additional Information:

   As noted above, synopses, conclusions, and OI agent's analyses normally are included in OI reports referred to the DOJ or to a U.S. Attorney's Office. The situation involving OI reports on Northeast Utilities, Millstone, and Haddam Neck is believed to be the only time conclusions or analyses have been excluded at the request of DOJ. It is noted that the manner in which the evidence in this matter was shared with DOJ is typical of and consistent with the form in which such information is commonly communicated by investigative agencies, as DOJ attorneys frequently become involved in the evaluation of evidence at an early stage of most complex investigations.

4. The senior Office of the General Counsel (OGC) attorney who headed up the NRC workforce reduction process task force and who was a proponent for proceeding with an enforcement action in OI case 1-96-007 at the December 2, 1997, enforcement panel, was not informed of the June 9, 1998, enforcement panel. Should steps be taken to ensure continuity of the same office representatives, if possible, at all subsequent enforcement panels concerning a particular case? If so, what steps should be taken?

Response: Yes, on January 14, 1999, the Director of OE issued Guidance for Preparing and Maintaining EA [Enforcement Action] Requests & Enforcement Strategy Forms - EGM 99-001, addressing documenting and coordinating enforcement deliberations. Additional guidance will be developed by February 26, 1999 to formalize existing practice that the same office representatives, if practicable, should attend all enforcement panel meetings for a particular case. Additionally, further enhancements for providing continuity in the enforcement process will be considered as a result of assessments of the Enforcement and Investigations programs.

Additional information:

By way of background, enforcement panels are convened to assist the Director of OE and Regional Administrators in reaching enforcement decisions. Normally, as provided by the Enforcement Manual, representatives of OE, the involved region, and the program office attend enforcement panels. The Director or Deputy Director of OE, represents OE, a regional Division Director or other regional SES manager represents the region, and the Project Manager or Project Director represents NRR (in the case of NMSS, the NMSS enforcement coordinator represents NMSS). OGC attends the more significant panels, including those involving wrongdoing and discrimination, to provide legal advice and counsel. Other participants include enforcement specialists from OE, NRR, and the region, inspectors, investigators, other supervisors, and individuals who have relevant information for the enforcement decision. Following the panel, OE issues the Enforcement Strategy Form, in accordance with the Enforcement Manual, reflecting the positions of the panel. The region, after receiving a copy of the Strategy Form and briefing the Regional Administrator, informs OE if the Regional Administrator has a different view.

Current practice is that the office or regional representative at an original panel should normally attend the subsequent panels to provide continuity. Sometimes representatives cannot attend a follow-up panel. In such cases, depending on the issues, the panel may be rescheduled or conducted without the person present. If conducted without the previous representative, the representative who was not present should normally be briefed if there was a substantive change in the decision and the case, if necessary, repaneled. It should be noted that it is not unusual for positions arrived at during an initial panel meeting to be changed based on additional deliberations. If these deliberations take place outside the panel process without the involvement of the office or regional representatives from previous panels, OE is responsible for coordinating with the appropriate office or region to determine if that office or region is satisfied with the revised position or if another panel is needed.

Some NRC staff may attend a panel to provide information relevant to the enforcement review but who do not participate in the full enforcement review. For example, in some cases it is important to have a program office staff member with particular technical knowledge at the panel to discuss how a particular requirement has been applied in the past or what was the basis of a licensing requirement; that individual’s presence may not be needed for all further panels on the same case.

In addition, it is routine to have OI staff, including the investigator, participate at an initial enforcement panel to assist the staff in understanding the investigation by providing a "road map" through the evidence, answering questions, and adding insights for enforcement considerations. This occurred at the December 1997 panel on Case 1-96-007. However, as noted earlier, the OI conclusions, while helpful, are not dispositive. The staff must reach its own conclusions as to the facts. It must also decide whether the case has sufficient strength to proceed. Thus, once the views of OI are known, OI representation may not be needed at subsequent meetings where the evidence is examined and the strength of the case considered by the staff responsible for the enforcement decision, and by the OGC enforcement attorneys responsible for providing legal advice and counsel to the staff.

Continuity of OGC representation at enforcement panel meetings is desirable and is, in most situations, assured by OGC (although OGC does not attend all enforcement panel meetings). In this case, the attorney from the responsible unit of OGC who was assigned to provide legal advice and counsel in this matter, in fact, attended both the December 2, 1997 enforcement panel meeting and the June 9, 1998 enforcement panel meeting.

The participation of the Senior OGC attorney who headed up the NRC workforce reduction task force was sought at the December 1997 panel in the interest of obtaining his insights based on his earlier involvement in the task force effort. As noted at Page 11 of the IG report, it is unclear whether or not the senior OGC attorney was informed of the June 9, 1998, enforcement panel. In any event, the staff did not seek to exclude the senior OGC attorney involved in the NRC task force from the June 1998 panel.

The senior OGC attorney who headed up the NRC workforce reduction process task force does not normally provide legal advice and counsel to enforcement panels. However, OGC management had determined that the senior OGC attorney would be responsible for handling any administrative hearing that might result from an enforcement action on this matter. As a result, his position was discussed at various times prior to the June 1998 enforcement panel by those attorneys who did have the lead responsibility to provide enforcement counsel. He did not attend the June 1998 enforcement panel meeting but his views were known and were reiterated by the OGC enforcement attorneys who did attend this meeting.

5. What steps should be taken to ensure documentation of the reasons/bases for changes in enforcement panel decisions on a particular case? Who is responsible for preparing and retaining such documentation?

Response: EGM 99-001 was issued on January 14, 1999, to provide additional guidance for the use of Strategy Forms which document the status of the enforcement deliberations. This EGM supplements the existing guidance in the Enforcement Manual which provided that Strategy Forms be prepared only after a panel meeting. This new

guidance provides for amending the Strategy Form as positions change during subsequent panels or other deliberations, and provides for a brief basis for the changed position. Further enhancements for providing documentation of enforcement decisions may be developed as a result of the ongoing staff review and planned programmatic assessment of the Enforcement and Investigations programs.

The Strategy Form is completed by the OE enforcement specialist and concurred in by OE management. In certain routine cases involving materials licensees, the case is delegated to the region and the Strategy Form is prepared by the regional enforcement specialist. The guidance in the Enforcement Manual provides that copies of the form are sent to the region, the responsible program office, and OGC, if an OGC attorney attended the panel, and that the recipients are to promptly notify OE if the form does not reflect the position of their region or program office. OE is reinforcing these directions to assure that proper distribution is made.

As described in ESM 99-001, the Director of OE maintains a notebook of Strategy Forms filed by EA (Enforcement Actions) numbers. A copy is also maintained in the enforcement case files of OE, as well as in the active files of the enforcement specialists. Generally, they are retained in OE files for about two years after the case is processed.

6. What steps should be taken to ensure that parties at a subsequent enforcement panel on a particular case review decisions and rationales for the decision made at prior enforcement panels on the same case?

   Response: As was done during the June 1998 panel, it is standard practice to include consideration of the past status of a case at any subsequent panels on the case. EGM 99-001 formalizes this practice and directs that the past Strategy Forms be brought to subsequent panels.

7. What is the standard for determining whether harassment and intimidation or a 10 CFR 50.7 violation has occurred (e.g., more likely than not, no doubt, a consensus, etc.)?

   Response: It is the staff's practice to initiate enforcement action if there is a reasonable expectation that it can successfully demonstrate that the violation occurred. This involves consideration of all information - both that which supports and that which refutes - available at the time it initiates the enforcement action, to assure that the essential elements of the violation can be established. In the context of harassment and discrimination matters under 10 C.F.R. § 50.7 (and its counterparts elsewhere in the Commission's regulations), this requires, in general terms, that the staff be able to demonstrate, by credible evidence, (1) that an individual engaged in protected activity, (2) that an adverse employment action was taken and (3) that the protected activity was at least a contributing factor in that employment action. (The Commission's regulations do not automatically render a person who engaged in protected activity immune from discharge or discipline for legitimate reasons, or from adverse action warranted by nonprohibited considerations.)

Rarely is the case straightforward with direct evidence. In most cases, the decision that discrimination occurred is inferred from competing and circumstantial evidence. Evidence must be examined and judgments made on the ability to prove the case. Frequently, different staff looking at the same evidence, may arrive at different conclusions as to whether the violation occurred. In addition, in those instances in which a complaint has also been filed with the Department of Labor, DOL may also have a different view on the case. The different views are considered in deciding whether the staff is satisfied it has sufficient evidence and a reasonable expectation that it can prove the case. In the end, the staff must be able to demonstrate, by a preponderance of the evidence, that it is more likely than not that discrimination occurred.

8. How are enforcement decisions made (e.g., through consensus, majority rules, OE or OGC has final say, polling, etc.)? What weaknesses are evident from your review of the IG's description of the enforcement panel meetings? How should this process be improved?

Response: The Executive Director for Operations (EDO) and the principal enforcement officer of the NRC, the Deputy Executive Director for Regulatory Effectiveness (DEDE), have been delegated authority to approve and issue all escalated enforcement actions. The Director of OE has been delegated the authority to approve certain escalated enforcement actions provided the Regional Administrator and Program Office are not in disagreement with the action. Subject to the oversight and direction of OE and with approval of the DEDE, where necessary, regional offices normally issue Notices of Violations and civil penalties. Additionally, enforcement panels are conducted with the goal of reaching a consensus decision. This consensus is not always reached and as a result the OE Director must make the decision.

However, if the Regional Administrator or the lead program office (and in this case, the Director of the NRR Special Project Office (SPO) which had responsibility for Millstone instead of Region I at the time this OI case was investigated and processed for enforcement action) disagrees with the position of the Director of OE, then, in accordance with the delegations of authority to the Director of OE, which are described in the Enforcement Manual, the matter is escalated to the DEDE or the EDO. Consequently, in developing his position on cases, the Director of OE seeks the agreement of the appropriate Regional Administrator (or in this case, the Director, SPO) and coordinates cases as warranted with the program offices. In addition to the regional and program offices, OE also coordinates with OGC on the more significant cases, including all cases involving potential wrongdoing such as alleged discrimination. If OGC has a legal objection to proceeding with a case, that issue must be resolved before the enforcement decision is finalized.

The above description applies to the majority of escalated cases. In accordance with the delegations of authority to the Director of OE, certain cases must also be approved by the DEDE. In addition, as provided in section III of the Enforcement Policy, certain cases require Commission consultation. Finally, in cases involving OI investigations, if

there are disagreements between OE and OI, the Director of OI must decide whether the difference needs to be elevated to the Commission. This is discussed in response to Question 9.

The principal weakness in the processing of case 1-96-007 was poor documentation. The EA Request and Enforcement Strategy Form serves as a status note and briefing aid during deliberations. The Strategy Form for the December 1997 panel accurately stated that assignments were made to begin developing the enforcement documents, including a Commission paper, to initiate the enforcement process with a letter to the licensee. However, the Strategy Form did not reflect, as is more fully discussed below, that there were reservations about the case and that the position of the Director of OE, based on the panel discussion, was to proceed with development of the case pending further review of the evidence and receipt of additional information. As recognized in the IG report, the preliminary nature of this decision is reflected in a December 5, 1997, letter from the OI Region I FOD to the Department of Justice (DOJ) (Page 7), and in closed meetings with the Commission (Page 12). A final decision was subject to receipt of the investigator's notes supporting his position, further review of the evidence, a review of precedent court cases, and a review of relevant testimony from the investigation in Case 1-97-007. Therefore, the Strategy Form mistakenly leaves the impression that the result of the panel was final when, in fact, it was preliminary.

It is noted that it is not unusual to decide to begin preparing a case, e.g. begin drafting the enforcement documentation and Commission paper, as was done in this case, at the same time that deliberations are continuing. However, prior to issuing EGM 99-001, the preliminary nature of the decision in such cases was not reflected on the Strategy Forms. As a result of the new EGM, the Strategy Forms should be clearer in the future.

Further enhancements for providing documentation of the enforcement decisions may be developed as a result of the ongoing reviews and planned programmatic assessment of the Enforcement and Investigations programs.

Additional Information:

This, like many other wrongdoing cases, was a difficult case for reaching consensus. Nonetheless, the staff values the different perspectives brought by different individuals in arriving at an informed enforcement decision. The fact that there were different views, is a strength of the process. During the December panel, there was a healthy exchange of individuals' different views. Prior to the June panel, additional reviews of the evidence and numerous discussions occurred such that the panel meeting was briefer.

The December 1997 panel did not reach a final decision, although the Enforcement Strategy Form incorrectly states otherwise. During the December panel, the OI Region I Field Office Director (FOD) emphasized the need to review closely all the evidence, including the transcripts, especially those transcripts of the former Senior Vice

President, since the staff was trying to decide if discrimination occurred and who was responsible. The FOD also noted that the former Senior Vice President would be subject to additional interview(s) as part of another investigation that might produce relevant information. During the panel, the former OI investigator was also asked to provide OE a list of the specific points that would support his position as to whether discrimination occurred, so that his points could be reviewed against the actual evidence. Subsequent to the December panel, the OI investigator provided the requested information. The Director, OE, was of the view that further reviews were needed before he could conclude that discrimination occurred. OE staff members both before and after the December 1997 panel had reservations about whether discrimination occurred. OGC advised that though there was a *prima facie* case, the case was not strong. Both the Director of SPO and his Technical Assistant had indicated that they had read the OI report and did not feel a case had been substantiated. Further, the Director SPO noted that soon after the meeting, the Director of OE discussed reservations with him concerning whether discrimination occurred.

Furthermore, as noted above, OI recognized that the staff had not resolved the enforcement approach in this case. The Region I FOD notified DOJ in a letter dated December 5, 1997, shortly after the panel, that a preliminary decision was made. Similar information was provided to the Commission in a December 11, 1997, closed Commission meeting where the Director of OI, as noted in the IG report, told the Commission that a preliminary consensus had been reached and that the staff was continuing to review evidence and transcripts. The Director of OI continued to inform the Commission during the February 18, and April 30, 1998, Commission meetings, that the staff was still reviewing the case. During the April meeting, the Director noted that the staff was awaiting information from another investigation involving the same former Senior Vice President.

Additional deliberations continued within the staff and with OGC. Applicable court cases were reviewed as was the evidence compiled in the investigation. This review included considering the points made by the investigator. The additional interview of the former Senior Vice President, conducted as part of a separate investigation, was also considered. Notwithstanding the language used on the December 1997 Strategy Form, a final decision had not been made to go forward in this case. Rather, as noted above, additional deliberations should be documented as they occur.

The result of the deliberations and reviews of the evidence between December 1997 and June 1998 it was determined that there was insufficient evidence to proceed with an enforcement action. The June 1998 panel confirmed those deliberations. As noted in the IG report, the senior SPO representative in Region I who supported a finding of discrimination was involved in the June panel. In light of the prior deliberations, which admittedly were not documented, the June 1998 panel meeting essentially confirmed those prior discussions resulting in a briefer panel meeting.

9. Should the official position of each office that participated in an enforcement panel be documented?

Response: Yes, the official position of OE and the lead program offices or regions involved in an enforcement action is reflected in the concurrences of the enforcement document. The Strategy Form should reflect the position of the representatives of all offices or the region involved. The procedures for obtaining regional and office concurrence or comments are contained in the Enforcement Manual. The use of the Strategy Form, as enhanced by EGM 99-001 provides for better documentation of the status of the deliberations and positions of the representatives of the involved offices and region. The assessment reviews, already noted, will consider additional improvements to this documentation.

Additional Information:

As noted above, the EA Request and Enforcement Strategy Form serves as a status note and briefing aid during deliberations. During deliberations for many cases, especially the more complicated ones and many of the wrongdoing cases, positions change from the time the investigation or inspection report is first reviewed until the final enforcement decision is made. The enforcement specialists in OE and the regions are expected to be aware of the status of the cases.

The staff also notes that consistent with Commission direction in an SRM dated February 11, 1985 concerning SECY 84-429, Policy 22 of the Office of Investigations, November 5, 1984, OI does not take positions on enforcement actions. Nevertheless, OI has an important role in the enforcement process by developing the evidence needed in cases involving wrongdoing and providing valuable insights which assist the staff in its review of the evidence. As noted earlier in response to Question 1, the Commission, in a March 18, 1986 SRM stated that “the staff is not obligated to accept without question the conclusions of the OI report.” However, in the interest of maintaining OI’s independence and as a check on the process for considering cases of potential wrongdoing, if the Director of OI believes consultation with the Commission is warranted, the staff prepares a Commission paper addressing the dispute as provided in section III(5) of the Enforcement Policy.

Nevertheless, both OI and the enforcement staff recognize that written conclusions and analyses are important. The written analysis in an OI report provides a “road map” that assists the staff in understanding how OI reached its conclusion. OI’s written conclusions reduce the potential for misunderstandings and serve as a basis to address differences. OI has internal procedures to address differing views regarding written conclusions in OI reports. Although the procedures were not formally initiated in this case, the spirit and intent of the procedure, i.e., ensuring that differing views are provided, was met. In fact, the OI investigator, the Region I Field Office Director (FOD) and Director of OI were all present at the December 1997 enforcement panel meeting and had the opportunity to express their views. Although OI management did not share the view of the investigator, they encouraged him to articulate his views and he did so.

10. Who ultimately is responsible or accountable for an enforcement decision?

Response: The Director of the Office of Enforcement is responsible unless the decision is escalated to the DEDE, EDO, or Commission. See also the answer to Item 8.

11. Although the Region I OI Field Office Director (FOD) believed that the claim of H&I had been substantiated in OI case 1-97-007, how did the July 28, 1998, enforcement panel reach the conclusion that no enforcement action was warranted? Were the panel's reasons for its conclusion documented? Did OI challenge the decision of the panel? If not, why not?

Response: The facts associated with OI case 1-97-007 were informally discussed among OE, SPO field office, regional enforcement staff supporting SPO, and OGC staffs several times prior to the July 28, 1998 enforcement panel. During these discussions, the general consensus was that the case was weak and the evidence in OI Report 1-97-007 did not support a finding for discrimination. Although the report did not contain any written investigative conclusions as to whether discrimination occurred, the view of the Region I FOD and the OI investigator who performed the investigation was that discrimination by the licensee had occurred. However, contrary to the statement in the IG report, the FOD did not believe that there was sufficient evidence to substantiate that the former Senior Vice President deliberately caused the discrimination.

The July 1998 panel discussion was not lengthy. There was agreement among OE, OGC, SPO, and the regional enforcement staff that the evidence was not sufficient to initiate an action based on a finding of discrimination. It was proposed that no enforcement action be initiated for OI case 1-97-007. OI, having had the opportunity to present its position, did not feel the need to challenge the panel's decision since the investigator recognized that the case was a close call. Thus, the decision was not presented to the Commission.

The EA Request and Enforcement Strategy Form for the July 28, 1998 enforcement panel stated that no action was to be taken based on OI 1-97-007. The rationale for this decision was not explicitly stated on the form. However, the decision was based on the undocumented deliberations that occurred before the panel was convened which had not changed as a result of the discussions during the panel with OI representatives. As a result of EGM 99-001, these deliberations will be better documented in the future.

12. On what basis does the Department of Justice advise the Chairman and Commissioners against having their staffs present and against taking notes at and retaining notes from closed investigative briefings?

Response: The basis for the position of the U.S. Attorney's office in Connecticut, as stated in its January 2, 1997, letter to the OI Region I Field Office Director is as follows:

> Ordinarily, this Office would oppose any disclosures concerning the investigation of potential criminal matters. ...
> It is critical to the integrity of the investigative process that all matters discussed during this meeting remain confidential. The NRC has experienced a number of "leaks" that give this office pause in sanctioning this proposed meeting. We request, therefore, that non-OI attendees of this meeting take no notes and prepare no memoranda concerning these discussions. Additionally, we ask that OI make no representations to anyone concerning the position of this Office on any particular matter, or on the investigative effort in general.

The "leaks" that the letter referenced dealt with OI reports on Millstone/Spent Fuel Pool and Maine Yankee/RELAP5YA.

13. What improvements should be made in briefing the Commission on investigative matters to enhance continuity of knowledge and inform the Commission of significant changes in the disposition of cases? How should communication in closed investigative briefings be improved such that the Commission can stay informed on a particular case from briefing to briefing, can be apprised of any changes in the case from briefing to briefing, and can ensure that there is appropriate continuity regarding the case?

Response: Quarterly briefings will be offered to the Commission to discuss sensitive OI investigations and associated enforcement implications and status. This will not preclude more frequent meetings to notify the Commission of sensitive issues occurring between meetings. The staff will provide written information that can be followed in conjunction with the oral briefing. In subsequent briefings, any investigation or enforcement action that has been previously discussed will be updated until the investigation is closed or decision made on issuance of an enforcement action. Any significant deviation from the previously briefed status on OI efforts will be highlighted during the oral presentation by OI. Written information was provided at the closed OI Commission meeting held on January 15, 1999. While these meetings will continue to be closed, as with any sensitive closed meeting, necessary Commission and EDO staff may attend on a need-to-know basis. The Commission will be informed by either memorandum or personal communications from the staff of substantive changes in status that occur between meetings. The above arrangements will be formalized in appropriate guidance documents by June 1999. This should improve the information flow on sensitive cases. Further enhancements for communications may be developed as a result of the consultant- assisted, programmatic assessment of the Enforcement and Investigations programs.

14. The event inquiry (p.17, paragraph 6) concluded that a number of allegers were informed that their claims of discrimination were not substantiated even though no investigation of their individual allegations was conducted. The IG inquiry indicated that because NRC did not conduct an investigation into these allegations, the NRC staff had insufficient information on which to base this conclusion. Should all allegations of

discrimination be investigated in order to make individual determinations as to whether each allegation is substantiated?

Response: No. All allegations of discrimination should not be investigated. Conversely, NRC should not make determinations on whether an individual was subject to discrimination without an investigation into the merits of the individual's case.

The purpose of NRC investigations is to determine if the actions of the licensee resulted in a violation of 10 CFR 50.7 (Employee Protection) such that corrective actions are needed to address the chilling effect of an environment where employees may be reluctant, or "chilled", from bringing health and safety concerns to the attention of licensee management or the NRC. It is not to provide a personal remedy(e.g, back pay, reinstatement); the Department of Labor (DOL) has that responsibility. The staff does not investigate every case of alleged discrimination. The IG report noted that the NRC is not required by NRC Management Directive 8.8 to investigate all allegations of discrimination.

Additional Information:

As to the January 1996 layoffs, a number of allegers were informed that their claims of discrimination were not substantiated even though no investigation of their individual allegations was conducted. The letters stated that (1) several investigations were conducted, concerning multiple individuals, to determine whether these employees were terminated in retaliation for having engaged in protected activity for raising safety concerns; and (2) a comprehensive review of the NU workforce reduction process, as it applied to employees who had previously engaged in protected activities, was conducted by the NRC. The letter also indicated that based on those investigations and reviews, the NRC concluded that there was not sufficient evidence to substantiate those allegations of discrimination. The letter further noted that although an OI investigation was not initiated to examine the individual's specific claim of discrimination, the NRC concluded, based on its generic review of the NU workforce reduction process, that the individual was not terminated for having raised safety concerns, and the individual's concern was not substantiated.

These letters should not have stated that a conclusion had been made for cases where the individual's specific case was not investigated by OI. The staff intends to send each of those individuals a supplemental letter to apologize for the miscommunication and to clarify the NRC's actions with respect to its evaluation of the January 1996 layoffs and its position on the individual's allegation. A sample of the letter is attached.

While the staff did not investigate each allegation of discrimination from the January 1996 layoffs, it did conduct four investigations involving nine individuals who had alleged discrimination based on these layoffs. These investigations included claims of discrimination which presented the strongest potential for being substantiated. In the staff's view, in light of the purpose of NRC investigations, it appropriately balanced the need to understand whether the layoffs were discriminatory, against the need to avoid

adversely affecting other wrongdoing investigations at Millstone and other sites. The IG report states that "...OIG found that the staff's decision to investigate only the cases which provided the strongest evidence of discrimination was not inappropriate." Following completion of the review of the four investigations, the staff concluded that further investigations of the remaining allegations associated with the January 1996 layoffs were not warranted.

It should be noted that the IG report stated that "the NRC staff's handling of enforcement action regarding OI Case 1-96-007 runs counter to this stated enforcement philosophy." It is not clear what enforcement philosophy was not met. Since the staff concluded that discrimination was not substantiated for the cases that were investigated, enforcement action was not taken.

In addition, the staff does not believe that additional investigations associated with the layoffs in January 1996 are warranted as NRC investigations are designed, as noted above, to determine if the actions of the licensee resulted in a violation of 10 CFR 50.7 (Employee Protection) such that significant corrective actions are needed to address the chilling effect of an environment where employees may be reluctant, or "chilled", from bringing health and safety concerns to the attention of licensee management or the NRC. In that regard, since the 1996 layoffs, NRC has taken significant action against NU to address the environment for raising safety concerns, including the issuance of an Order that required a third party oversight of Northeast Utilities's efforts to develop a safety conscious work environment at the Millstone site. As confirmed by the third party oversight organization and NRC evaluations, licensee management actions at Millstone have resulted in an improved environment for raising safety concerns.

Attachment 3

SAMPLE LETTER SAMPLE LETTERS TO ALLEGERS SUBJECT
TO THE JANUARY 1966 LAYOFFS

I am sending you this letter to clarify the information I provided you in my ___ letter. That letter described the NRC evaluation of Northeast Utilities' termination of approximately 100 employees, including yourself, in January 1996.

As I noted in my previous letter, several investigations were conducted, concerning multiple individuals, to determine whether those employees were terminated in retaliation for having raising safety concerns. However, the NRC did not conduct an investigation of the terminations of each of the individuals laid off in January 1996 claiming discrimination. Rather, the NRC selected a sample of the individuals terminated in January 1996, and the NRC Office of Investigations conducted four investigations addressing those layoffs. Based on the review of the evidence obtained during those OI investigations, the NRC concluded that there was not sufficient evidence to substantiate that those specific individuals were dismissed for raising safety concerns. On this basis, the NRC determined that there was not sufficient evidence to conclude that the overall process applied by NU to effect the workforce reduction was discriminatory and thus further investigations were not warranted.

The NRC considers this determination appropriate, particularly since the purpose of an NRC investigation of discrimination in this or any other instance is not to provide a remedy to any individual who may have been wrongfully terminated, but rather to determine whether a licensee has violated the NRC regulations which prohibit discrimination for raising safety issues. Providing a personal remedy is the responsibility of the United States Department of Labor, which will undertake an investigation of any complaint filed with it, provided the complaint is filed within 180 days of the alleged discrimination, as I noted in an earlier letter to you dated ____.

My earlier letter informed you that there was not sufficient evidence to conclude that discrimination was a factor in the NU terminations in January 1996. That letter also advised that in your specific case, an OI investigation was not initiated to examine your specific claim of discrimination. Despite that fact, that letter further stated that the NRC concluded, based on its generic review of the NU workforce reduction process, that you were not terminated for having raised safety concerns. The letter incorrectly stated that the NRC had reached a conclusion regarding your specific case. In fact, we had not.

The NRC apologizes for the letter of _____ and regrets any misunderstanding that may have resulted from it. If you have any additional questions, please contact me at ___